Supreme Court, U.S.
FILED

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NO._____

IN THE
SUPREME COURT OF THE UNITED STATES
October, 1994 Term

***

William J. Zisk
Petitioner

vs.

High Street Associates
Respondent/Real Party In Interest

Mary A. Zisk; Edward J. Zisk; Donald R. Zisk;
Architects Equity Inc.; A.C.F. Inc. (J Gottlieb)
Respondents/ Indispensable Parties.

***

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF
MIDDLESEX COUNTY, STATE OF CONNECTICUT

***

PETITION FOR WRIT OF CERTIORARI

***

By: William J. Zisk
205 Thomas Street
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(916) 782-2233

December 10, 1994

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INTRODUCTION

This petition is submitted for review of several aspects of a complaint for partition of real property, and, the judicial process involved with the seizure and court ordered 'forced sale' of petitioners real property, solely for the benefit of a non-owner; versus allowing the court to determine the proportionate title ownership shares of the subject real property, and proceed to partition [in kind] among the "**legal owners**".

QUESTIONS PRESENTED

1. May a disputed legal title to real estate be settled in a partition action?

2. Does a deed or other conveyance to a grantee, not in existance at the time of conveyance, grant [legal title] to the land or estate described in the conveyance?

3. May a mortgagee, mortgage non-owned real property, prior to obtaining legal title ownership?

4. Under the principals of res judicata and collateral estoppel, does a summary judgment rendered against an individual plaintiff, in a prior partition suit, which was not appealed, bar the second filing of an **identical** partition suit, concealed by using the name of an alleged "fictitious" partnership as a plaintiff?

5. Does a combination of two alleged corporations, without naming individual persons, constitute a legal 'true partnership'?

6. Does a nonexistent plaintiff have standing to file suit?

7. May a fictitious partnership be established for the **sole purpose** of investing in a single parcel of real estate, to create an agency relationship, with no intention to carry on a trade, occupation, or business, and the only indicium of the alleged partnership was to share in profits.

8. May a court **deny** the statutory requirement, that all "real persons" alleged to be indispensable necessary parties, be joined in suit and counter suit, in order to insure a complete due

process determination of all matters, including allegations of bad faith, fraud, misrepresentation, concealment, coercion, duress, and undue influence in the controversy?

9. May an individual, with a "life use interest" in real property, convey a purported ownership interest, via a quit claim deed, warrantee deed, and mortgage deed and note, and not be deemed an indispensable party to an action in partition?

10. May an entire parcel of real property be mortgaged by a "non-legal owner"?

11. Does a **"non** owner" of real property have standing to partition?

12. May a mortgagee, mortgage property he does not own?

13. May an appellate jurist sit as a Superior Court Judge, and pass orders and judgments, which may be the subject of an appeal?

LIST OF PARTIES

The title of this petition contains the names of all parties whose judgment is sought to be reviewed. Petitioner submits that although the lower court denied petitioners motion to implead, the resultant effect is a judgment that is in the interests of those named indispensable parties on the cover of this petition for writ of certiorari.

VERIFICATION

I, William J. Zisk am the petitioner in this Honorable Court and I have prepared this petition. I have read it and am familiar with it's content. As to those matters of statements of personal knowlege, I declare them to be true and correct. As to those matters of statements under belief, I believe them to be true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED THIS DECEMBER 12,1994 IN ROSEVILLE, CALIFORNIA

S / "WILLIAM J. ZISK" ---PETITIONER

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PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF MIDDLESEX COUNTY STATE OF CONNECTICUT

JURISDICTION

The Supreme Court for the State of Connecticut, denied petitioner's PETITION FOR CERTIFICATION TO APPEAL on September 14,1994, without opinion and is seen in APPENDIX E, page 1e.

OPINIONS BELOW

APPENDIX A, pages 1a, 2a, 3a, is petitioner's MOTION FOR ARTICULATION AND RECLARIFICATION dated May 25,1994, which was denied by 'Spallone on 6-15-94' (page 3a).

APPENDIX B, pages 1b, 2b, 3b, 4b, 5b, is the MEMORANDUM OF DECISION of the Superior Court of Middlesex Judicial District, State of Connecticut, dated May 5,1994 under the signature of 'Spallone' and is the subject of this petition.

APPENDIX C, pages 1c, 2c, 3c, 4c, is a REVISED JUDGMENT dated May 18,1994, under the signature of 'Michael Kokoszka, Chief Clerk' (page 4c).

APPENDIX D, page 1d, is the May 31,1994, Connecticut Appellate Court decision; *the judgment is affirmed,* (without opinion on the merits).

APPENDIX E, page 1e, is the Connecticut State Supreme Court ORDER ON PETITION FOR CERTIFICATION TO APPEAL, dated September 14.1994, which denied petitioner's petition for certification to appeal from the Appellate Court, (without opinion on the merits).

APPENDIX F, page 1f, is a ORDER under the signature of 'Aurigemma , J.' , approving the Sale, Deed, Report and Fees without any consideration of petitioner's valid objections.

CONSTITUTIONAL PROVISIONS, COURT RULES, STATUTES, AND TREATISES

FOURTH, FIFTH AND FOURTEENTH AMENDMENTS to the CONSTITUTION OF THE UNITED STATES.

SUPREME COURT COURT Rules No. 19, 20. 28 U.S.C.A. §2106. FEDERAL RULES OF COURT No. 19 (a, b) et seq., 28 U.S.C.A.. 'WORDS AND PHRASES': "STANDING"

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STATEMENT OF THE CASE

On December 3,1943, William W. Zisk and Mary A. Zisk, as husband and wife, purchased the property at 106 High Street, Higganum, Connecticut 06441, hereinafter subject property, by manuscript warrantee deed, recorded in the Land Records of the Town of Haddam, Connecticut, at Volume 67, pages 469, 470, consisting of a total of 32 acres.

During the marriage of William W. Zisk and Mary A. Zisk, four children were born, raised, educated and reared in their native Connectitut heritage; Willaim J. Zisk, Edward J. Zisk, Marion A. (Zisk) Krivanec and Donald R. Zisk.

William J. Zisk is the eldest son of William W. Zisk and Mary A. Zisk, who enlisted in the United States Air Force, from the State of Connecticut in 1948..

While in the military service, William J. Zisk, met his present wife, Lois, and they were married on July 20,1952 in Roseville, California. As a "wedding gift" to the newlyweds, William W. Zisk and Mary A. Zisk (father and mother) granted a four acre portion of the subject 106 High Street, Higganum, Connecticut property, adjacent to Route 81, to their son, William J. Zisk.

As a condition of the "granted gift", William W. Zisk and Mary A. Zisk agreed to hold the gifted 4 acre parcel in a "trust" within the overall 32 acre homestead, pending disposition of an independent Deed, and recording of the grant at the Haddam Town Hall in Connecticut. No time constraints were imposed on the grant by the Grantors, and a deed to the gifted parcel was impliedly available to Grantee, William J. Zisk, (son) at any time.

In 1952, William J. Zisk was honorably discharged from the U.S. Air Force at Sacramento, California, and he and his wife, Lois, returned to the family homestead at 106 High Street, Higganum, Connecticut.

Upon returning to the Connecticut homestead, William J. Zisk made substantial improvements to the second story, of the family home, for purposes of temporary living quarters for the newlyweds. Substantial preparations and improvements were made to the gifted 4 acre parcel on Killingwotrh Road, in commencement to build a new home for William and Lois Zisk. All improvements were completed on the four acre parcel with the full knowlege and consent of William W. Zisk and Mary A. Zisk. The site location where the new home is to be constructed, was cleared of trees, and a driveway access off of Killingworth Road was prepared.

In 1953, a self employed business venture became available in Roseville, California. William J. Zisk and his wife, Lois, decided to temporarily postpone construction of their new home on the 4 acre parcel in Connecticut and pursue employment in the sand and gravel and trucking business, in the rapidly growing State of California.

On February 3,1969, while alone at a temporary residence at 115 Linda Drive in Roseville, California, William W. Zisk was stricken with a fatal heart attack and died at the Roseville Hospital.

William W. Zisk died "intestate" and Mary A. Zisk was appointed Administratrix to probate the "Domicillary Estate" **in Connecticut.** The entire estate, both personal and real property was "**all**" acquired while William W. Zisk and Mary A. Zisk were residents and domiciled in the **State of Connecticut.**

Mary A. Zisk, without the knowlege, consent or participation of William J. Zisk, initiated probate proceedings in **Placer County, California.** At all times prior to his death, William W. Zisk was a resident and domicillary of **Connecticut.**

The existance of probate proceedings in **California** was first discovered by William J. Zisk, **after** the commencement of the partition proceedings, involving the family homestead at 106 High Street.

Mary A. Zisk initiated probate proceedings in **Placer County, California,** without providing **any** notice to the "legal heirs" to the estate of William W. Zisk, alleging to be the "sole heir" to his entire estate, wherever situated.

Mary A. Zisk later initiated ancillary administration proceedings in the Probate Court for the **District of Haddam, Connecticut**, on or about November 15,1969. Without the knowlege, consent or participation of William J. Zisk, Mary A. Zisk submitted only one-half of the 32 acre family homestead, to the Probate Court in Haddam, Connecticut, to be properly administered as a decedents estate. In fact, the decedent held no interest in the four acre parcel, having conveyed the same to William J. Zisk, and, as to the remaining 28 acre parcel, the entire interest therein was subject to administration by the Probate Court in Haddam Connecticut.

As to the interest in the estate of William W. Zisk held by Mary A. Zisk, the applicable Connecticut General Statutes, Title 46, Chapter 809, Section 46-12, clearly establishes, a "surviver" to the Husband and Wife Deed to hold a **life use** interest , which is not marketable.

The disputed title to the Zisk family estate could not and was not capable of being resolved in a partition action, without the active indespensible inclusion and participation of the members of the Zisk family.

***

This is an appeal from the decision of the Middlesex County Superior Court in High Street Associates v. William J. Zisk , 34. Conn App. 923.

Respondent alleges a one count partition/sale complaint of the Zisk family homestead, located at 106 High Street, Higganum, Connecticut 06441.

Commencing by complaint dated September 8,1989, returnable on November 14,1989 to the Superior Court in Middletown, Steven A. Rocco, as an individual and attorney-in-fact, brought a "first" partition action, Docket No. CV 89-56040S, against petitioner William J. Zisk. The complaint was dismissed by Judge O'Connell, when the court granted petitioner's Motion for Summary Judgment, which was not appealed. Said motion was based on the claim that a contract-purchaser did not have standing to bring a partition action, **not** being an "owner".

On May 8,1991, Mary A. Zisk, Donald R. Zisk, and Edward J. Zisk, by quit-claim and warranty deed, purported to convey their interest in the subject property to High Street Associates, an alleged "partnership". On May 23, 1991, respondent High Street Associates, gave back a mortgage on the entire 32 acre parcel, to three members of the Zisk family in the amount of $183,333.32, payable in 5 years, interest free.

By complaint dated June 4,1991, returnable on July 16,1991 to the Superior Court in Middletown, the respondent High Street Associates brought the "second" instant partition action, docket No. CV 91-0062496S, against petitioner William J. Zisk, under the fictitious trade name of 'High Street Associates'.

On July 18,1991, Steven A. Rocco, as sole principal of High Street Associates, filed in the Land Records of the town of Haddam, a Certificate of Trade Name, publicly declaring Architects Equity Inc. to be the sole component of High Street Associates.

Respondent High Street Associates, purportedly a Connecticut General "partnership", consisted, per the testimony of Steven A. Rocco, solely of Architects Equity Inc., a corporation owned and comprised "solely" of Steven A. Rocco.

On September 27,1991 the petitioner filed his answer to the complaint and forwarded seven Special Defenses claiming, inter alia, that the respondent, High Street Associates, procured its alleged title to the property through fraudulent acts (first special defense), and by way of an invalid agreement and civil conspiracy (second), prejudicial non-joinder and misjoinder of indespensible necessary parties (third), false representation, concealment, duress, coersion, undue influence, mistake and breach of fiduciary duty (fourth), and grant of the four acre parcel (fifth), and that the action was barred under the principles of 'res judicata' and 'collateral estoppel' (sixth), and that the respondent High Street Associates lacked standing (seventh).

On December 4,1991, seven months "after" the alleged purchase, A.C.F. Inc. (a corporation comprised only of Jonathan Gottlieb), "officially", according to Steven A. Rocco, became a part of High Street Associates.

On December 4,1991, Steven A. Rocco, filed a "second" Certificate of Trade Name, this time disclosing that High Street Associates, was then comprised of Architects Equity Inc. and A.C.F. Inc.

Petitioner, William J. Zisk, filed a counterclaim to respondents complaint on November 23,1992, naming High Street Associates, Mary A. Zisk, Edward J. Zisk and Donald R. Zisk as defendants. The respondent answered, and filed a Special Defense on December 2,1992.

On February 11,1993, pursuant to Connecticut General Statutes Section 52-102a, a Motion to Implead Third Party Defendants Mary A. Zisk, Edward J. Zisk and Donald R. Zisk, was filed on behalf of petitioner, as well as a request to file an Ammendment to the Counterclaim.

On February 11,1993, petitioner also filed a motion requesting an order for a [partition in kind] of the subject property, in that the feasability and physical attributes of the land lends itself to Partition in Kind.

The motion to Implead, alleged that the respondents' alleged predecessors in-title, Mary A. Zisk, Donald R. Zisk and Edward J. Zisk were indespensible parties in that they had current ownership interests in the property based on the fraud of the

respondent in procurring purported title and their position as mortgagees.

On February 16,1993, respondent High Street Associates filed objections to petitioner, William J. Zisks' Motion to Implead the third party defendants.

On March 1,1993, trial judge Daniel F. Spallone **DENIED** the petitioners Motion to Implead necessary parties, and third party complaint, without prejudice. The motion was filed pursuant to Connecticut Rules of Court Section 117.

Also, on March 1,1993, Judge Spallone **DENIED** the petitioners motion for a [Partition in Kind], and **SUSTAINED** the respondents objection to the petitioners Motion to Implead third party defendants, High Street Associates, Mary A. Zisk, Edward J. Zisk, and Donald R. Zisk.

On March 23,1993, the petitioner filed a motion to have Judge Spallone reconsider the "denial" of the Motion to Implead certain necessary partys to this action, the third party complaint, and the "sustaining" of respondent objections thereto.

On March 29,1993, the petitioner filed a Motion to Strike the respondents' partition complaint, with Memorandum of Law, for failure to join necessary parties, namely, Mary A. Zisk, Edward J. Zisk and Donald R. Zisk. The petitioner based his motion on the claim that mortgagees were necessary parties to a partition action and who had effectively retained "title ownership" in the subject property through the purported deed transfers.

On March 30,1993, Judge Spallone **DENIED** the petitioners' Motion to Strike the complaint, and to reconsider, <u>without explanation</u>. Exception, to the denial was noted on the record.

Trial was held before the Honorable Daniel F. Spallone on March 30 and 31, 1993, over the objections of petitioner, William J. Zisk, and, without the inclusion of necessary parties, Mary A. Zisk, Edward J. Zisk and Donald R. Zisk.

Judge Spallone issued a Memorandum of Decision dated May 5,1993, and Revised Judgment dated May 18,1993. Judge Spallone did not make any rulings during trial, or after trial, regarding petitioners seven Special Defenses to the respondent partition complaint.

On May 25,1993, pursuant to Connecticut Rules of Court, Section 4051, the petitioner filed, in the Appellate Court, a Motion for Articulation and Reclarification of Judge Daniel F. Spallones' judgment after trial.

On June 15,1993, by order, Judge Spallone **DENIED** the petitioners Motion for Articulation and Reclarification of the judgment after trial, without explanation.

Petitioner William J. Zisk, appealed the judgment, and the Connecticut Appellate Court **AFFIRMED** the judgment, without opinion, on May 31,1994.

On June 9,1994, the petitioner filed a Motion for Rearguement or Reconsideration in the Appellate Court, which was **DENIED** on June 29,1994, without explanation.

Immediately thereafter, and during the period when an automatic stay of execution of the judgment was in effect, the respondent noticed a hearing, to be heard before the Honorable Daniel F. Spallone, in Superior Court at Middletown, on July 15,1994, to set a date to execute on the judgment, over the objections of petitioner William J. Zisk. Judge Spallone **OVERRULED** petitioners objections and set September 17,1994 at 12 noon to execute on the judgment.

On July 28,1994, the petitioner petitioned the Connecticut Supreme Court for certification to appeal from the judgment of the Appellate Court.

On August 4,1994, the respondent filed a motion in the Appellate Court to terminate the automatic stay of execution of the judgment, to which the petitioner filed objections thereto, on August 12,1994.

On September 8,1994, the Appellate Court **GRANTED** the respondents' motion to terminate the automatic stay of execution of the judgment, which was still in effect.

Also, on September 8,1994, Mary A. Zisk, not having been included as an indespensible necessary party to this proceeding, died in Roseville, California at the age of 82.

On September 13,1994, pursuant to Connecticut Rules of Court Section 4053, the petitioner filed a motion in the Appellate Court, for review of the order terminating the automatic stay of execution of the judgment.

On September 14,1994, the Connecticut State Supreme Court **DENIED** the petition of petitioner William J. Zisks, for certification to appeal from the judgment of the Appellate Court.

On September 17,1994, as per the **ORDER** of Judge Daniel F. Spallone, the respondent Committee executed a sale of the Zisk family homestead, located at 106 High Street, Higganum, Connecticut.

On September 20,1994, respondent Committee filed a motion in the Superior Court of the State of Connecticut at Middletown, for approval of committee sale and committee deed, acceptance of committee report, and allowance of fees and expenses.

On September 22,1994, pursuant to Connecticut Rules of Court Section 4050, petitioner William J. Zisk filed a motion in the Appellate Court of the State of Connecticut, for stay of execution of the judgment, pending decision in the case by the United States Supreme Court.

On September 23, 1994, respondent opposed petitioners motion filed in the Appellate Court for review of order terminating the automatic stay of execution of the judgment.

On September 30,1994, petitioner filed objections to the respondent Committee motions in the Superior Court, for approval of committee sale and committee deed, acceptance of committee report, and allowance of fees and expenses. Petitioner filed additional objections on October 21,1994.

On October 5,1994, the Connecticut Appellate Court **DENIED,** both, petitioners' motion for review of order, terminating the automatic stay of execution of the judgment, and, the motion for stay of execution of the judgment, pending decision in the case by the United States Supreme Court.

On October 11,1994, pursuant to Connecticut Rules of Court Section 4053, the petitioner filed a motion in the Connecticut Supreme Court, for review of the order of the Appellate Court denying petitioners motion for stay of execution of judgment, pending decision in the case by the United States Supreme Court, and, motion for review of order by Appellate Court denying petitioners' requested relief for review of order terminating the automatic stay of execution of the judgment.

On October 24,1994, although Judge Spallone made every prior ruling in the case, Superior Court Judge Julia L. Aurigemma **GRANTED** respondent Committees' September 20,1994 motion for approval of committee deed, acceptence of committee report, and allowance of fees and expenses. Petitioner, William J. Zisk had timely filed objections thereto on September 30,1994 and October 21,1994, which have apparently been disregarded in Judge Aurigemmas' noted ruling on approval of sale.

On October 28,1994, pursuant to Connecticut Rules of Court, Sections 4053, 4183 and 4187, petitioner William J. Zisk filed in the Supreme Court of Connecticut, a motion to vacate trial court order dated October 24,1994, granting motion for approval of committee sale and committee deed; motion for acceptance of committee report; motion for allowance of allowance of fees and expenses, dated and filed September 20,1994.

On November 3,1994, the Connecticut Supreme Court **DISMISSED** petitioners motion for review of order of Appellate Court, denying petitioners motion for stay of execution of judgment, pending decision in the case by the United States Supreme Court, and, motion for review of order by Appellate Court denying petitioners' requested relief for review of order terminating automatic stay of execution of the judgment..

On November 10,1994, respondent Committee filed a request for order of payment of fees from the Clerk of the Superior Court.

On December 5,1994, Superior Court Judge Julia L. Aurigemma **GRANTED** respondents Committees' order for, payment of committee fees and expenses. On December 5,1994, the Supreme Court of the State of Connecticut **DISMISSED** petitioners' motion to vacate trial court order dated October 24,1994, granting motion for approval of committee sale and committee deed; motion for acceptance of committee report; motion for allowance of fees and expenses, dated and filed September 20,1994.

REASONS FOR GRANTING WRIT OF CERTIORARI

1. The respondent trial court substantially abused discression and petitioner was denied due process by granting the second partition complaint which was filed under Connecticut General Statutes §52-500 (APPENDIX B).

§52-500 provides in pertinent part: "Sale of Real or Personal Property Owned by Two or More **Persons**" "(a) Any court of equitable jurisdiction may, upon the complaint of any **person** interested, order the sale of any property, real or personal, owned by two or more **persons**, when, in the opinion of the court, a sale will better promote the interests of the **owners**".

The question of ownership must first be resolved when title is in dispute, which is what is involved in this action. The fact remains that Judge O'Connell had prior found in favor of petitioner in the first partition action filed by Mr. Rocco alleging to be a real estate developer [which he did not appeal], in that a contract-purchaser is not a "legal owner" which is a mandatory prerequisite for a partition action. Therefore a partition action was not available to Mr. Rocco because he did not have "standing". See *Investors Mortgage Company v Rodia* 625 A.2d 834 (1993).

The evidence in the case reveals first and foremost, that respondent High Street Associates **did not even exist** when the purported Quit-Claim Deed, the Mortgage Deed and the Warranty Deed were executed, nor in existence when the second partition action was filed on June 4,1991, **AND**, High Street Associates is not a "**person**". *Duffy v Maciag* et al. 431 A.2d 1234 (1981)

No Title Insurance was involved in the totality of the sale involving a tremendous liability, to third parties purchasing lots/homes, needing real and valid Insurance protection.

High Street Associates was **NOT** "a Connecticut General Partnership" "having it's principal place of business at 1783 Saybrook Road, Haddam Connecticut 06438" on "May 8, **nor** May 23, 1991, **nor** June 4,1991" when the complaint was filed. See reasons hereafter under partnership heading for further support.

Whatever was the prayer of the complaint, "equity" may not be invoked. It is unequivocal that the "kernel of the controversy is the title to the land" which is unequivocally in dispute in this action. See *Narowski v Kichar* 435 A.2d 32 (1980).

In *Butler v Butler* 105 A.2d 62 (1954), which is a Supreme Court Case, the court found that a court vested with equitable jurisdiction will not, in absence of Statutory authority, decree partition until title has been settled in an action at law...quoting §68 C.J.S. PARTITION §39; SEE §35 , and *Huston v Lambert* 281 A.2D 511 (1971).

2. The trial court further substantially abused discression by ordering a partition by sale, instead of partition in kind, had the other elements of 'ownership' been resolved at law, prior to ruling for partition.

It is a fact that petitioner filed a motion for partition in kind and Judge Spallone **SUSTAINED** the respondent High Street Associates objections prior to trial. Although petitioner employed a professional appraiser who testified at length during the trial, that the feasability study conducted for purposes of evidence and the physical attributes of the land, were such that the Statutorily favored partition in kind was practicable.

It was further witnessed that the "subdivision application" , that Mr. Rocco had submitted in the first partition action found against him, had been **denied** by the Planning and Zoning Commission and the Inland and Wetlands Commission, which he did not submit any timely appeal to them for consideration. Judge Spallones reasoning for the sale was that the partition in kind would "destroy the subdividability of the property".

"A presumption exists in favor of a partition in kind over a partition by sale" , *Borzencki v Stakum*, et al. 489 A.2d 341 (1985). "The burden of proving that partition by sale would better promote owners interests in upon party requesting partition by sale", *Rice v Dowling* 581 A.2d 1062 (1990).

It is not possible to find in favor of sale in the context of **BOTH** WITNESSES admissions, that the subdivision had been shot down by the Planning, Zoning and Wetlands Commissions, that Judge Spallone, in his own reasoning, had no choice but to find for partition in kind because the feasability study and attributes of the land were such that partition in kind was practicable. **and statutorily** favored. *Delfino v Vealencis* 436 A.2d 28 (1980).

Clearly, it appears that there was no "owner" at trial, other than petitioner, who did not have the burden of proof, but who more than made a showing that partition in kind was the ONLY clear choice under the circumstances of the case.

3. High Street Associates did not comply nor conform with the statute as an alleged partnership and further 'lacked standing'.

A partnership is not a '**person**', natural or artificial, in fact or in law. Under the provisions of some statutes, a partnership whose articles are not in writing cannot take title to real estate. In the absence of statute so permitting, a partnership cannot, as such, acquire a legal interest in realty by virtue of a mortgage. Where the partnership name is fictitious, not containing either the full or surname of any member, the legal title remains in the grantor. see §68 C.J.S. PARTNERSHIP §72.

"Association entered into by parties was not "partnership" within ambit of Uniform Partnership Act", *Travis v St John* 404 A.2d 885 (1978). It is apparent that respondent High Street 'Associates' was established solely for the purpose of investing for profit, in this transacted parcel of real estate located on "High Street", with no intention to carry on a trade, occupation or business or to create an agency relationship.

It has been held that suit cannot be brought prior to compliance with the statute §68 C.J.S. PARTNERSHIP §66. In this particular instance, it is a fact that suit was brought on June 4,1991, without compliance with the statute.

4. Petitioner was deprived of due process by the denial of the motion to implead respondents/ indispensible parties, Mary A. Zisk, Edward J. Zisk and Donald R. Zisk.

It is a fact that the above named respondents retained legal title ownership in the subject property, adverse to petitioner, through the purported deed transfers. As such, their presence was indispensible for a full due process adjudication of all relevant issues, including fact finding to those seven special defenses set forth in petitioners answer, and, for a full and complete due procecss adjudication of petitioners November 23,1992 counterclaim.

The respondent trial court abused discression by denying petitioners motion to strike the complaint. "Each predecessor of title, ownership, or interest must be made a party to an action in which the final decree affects title, ownership, or interest in real property". §67A C.J.S. PARTIES §37, Connecticut General Statutes §52-102, 52-107, 52-108,

See §52-107: "Where one of the defendants has sold the land in controversy, and conveyed it, with covenants of seisin and warranty, he still has such an interest in the question of title, by reason of his covenants, as to make it proper that he [should] be joined in the suit".

§52-110: "When a counterclaim raises questions affecting the interests of third parties, the defendant may, and if required by the court shall, cause the third parties to be summoned in as parties to the action". In otherwords, pursuant to the foregoing, the trial court was without jurisdiction for failure to join indispensible parties and the action should have again been dismissed. See *Ferrofluidics v Advanced Vacuum Components* 789 F. Supp 1203 (1992), *Gwartz v Jefferson Memorial Hospital* 23 F.3d 1426 (1994).

All petitioner allegations pertaining to misrepresentations, fraud, undue influence, concealment, duress, and the like, were effectively wiped out by not including those indispensible parties to the suit. The proper procedure is to allow the motion to Implead and then let the party joined argue against inclusion.

See Connecticut Practice Book §152 through 158.

CONCLUSION

Petitioner has demonstrated that neither Steven A. Rocco or the alleged High Street Associates has ever held valid legal title to any portion of 106 High Street.

Mary A. Zisk, Edward J. Zisk and Donald R. Zisk have been indispensible necessary parties from the outset of the litigation.

The fictitious trade name of High Street Associates was non-existant at the time of purported title conveyance and filing of partition complaint.

Petitioner respectfully requests all proceedings in the lower courts be nullified and vacated with exception of petitioners November 23, 1992 Counterclaim, with remand for futher proceedings.

RESPECTFULLY SUBMITTED THIS DECEMBER 12, 1994

WILLIAM J. ZISK / PETITIONER

APPENDIX A

APPELLATE COURT
STATE OF CONNECTICUT
(Filed May 25 10:49 AM '93')
APPEAL NUMBER;
(Superior Court No.: CV-91-0062496 S)

HIGH STREET ASSOCIATES	SUPERIOR COURT
VS.	J.D. OF MIDDLESEX AT MIDDLETOWN
WILLIAM J. ZISK	MAY 25, 1993

MOTION FOR ARTICULATION AND RECLARIFICATION

Pursuant to C.P.B. Section 4051, the Plaintiff/Appellant hereby respectfully requests that the Trial Court rectify this Appeal and provide further articulation and reclarification concerning its decision of May 5, 1993, in the following respects:

1. By articulating its Memorandum of Decision by setting forth the factual and legal basis for the finding that the Plaintiff/Appellee/Partnership, was legally an owner of the subject property and whether the partnership was, and need be, in existance when it obtained title, in order to have standing to bring this partition action.
2. By articulating its Memorandum of Decision by setting forth the factual and legal basis for the conclusion that development of the subject property would be "virtually destroyed by a partition in kind".
3. By articulating its Memorandum of Decision by setting forth the factual and legal basis for finding for the Plaintiff on the Defendant's Third Count of his Amended Counterclaim alleging unjust enrichment and damages related to rental incomes and property taxes.
4. By articulating its Memorandum of Decision by setting forth the factual and legal basis in denying the Defendant's Motion to Strike of March 30, 1993.
5. By articulating its Memorandum of Decision by setting forth the factual and legal basis in denying the Defendant's Motion to Implead dated February 11, 1993.
6. By articulating its Memorandum of Decision by setting

forth the factual and legal basis in ordering the property to be partitioned by sale as opposed to partition in kind.

7. By articulating its Memorandum of Decision by setting forth the factual and legal basis, and identifying the method used, in arriving at a specific figure for the value of the property.

8. The Defendant seeks articulation of the factual and legal basis for the decision as referenced above so as to have a sufficient factual and legal basis to prosecute his appeal.

I. HISTORY OF CASE

Action to Partition real estate, with amended counterclaim by the Defendants. Case tried to the court (Judge Spallone) on March 30 and March 31, 1993.

The court issued a Memorandum of Decision dated May 5, 1992 in which it made certain orders in favor of the Plaintiff. The Defendant has appealed this decision. The transcript has been received.

II. STATEMENT OF FACTS RELIED UPON

The Trial Court did not address the issues regarding ownership of the property, money reimbursement due the Defendant, or rule on the Defendants' Special Defenses nor provide reasons for denying the Defendant's Motion to Strike dated March 30, 1993 and, Motion to Implead dated February 16, 1993. The court also made certain orders without providing a factual basis for its conclusions regarding ordering a partition by sale as opposed to a partition in kind, the value of the property, or whether the Plaintiff, as a partnership, need be in existance at the time when it acquired title, and finding.

NOTICE SENT: 6/16/93
JOZUS, TOMC, & MILARDO
CARTA, SLUIS & PALADINO
CARELLA & MOORE
CLERK, SUPERIOR COURT, G.A.9
TOPAC

III. LEGAL GROUNDS RELIED UPON

This Motion is filed pursuant to Section 4051 of the Practice Book.

THE DEFENDANT/APPELLANT
WILLIAM J. ZISK

S/"BY PAUL GOZZI"
CARTA, SLUIS & PALADINO
P.O. BOX 308
ESSEX, CT 06426

(203) 767-3100

JURIS # 11070

CERTIFICATIONS

I hereby certify that a copy of the foregoing document was mailed to the following counsel and parties on May 25, 1993 pursuant to P.B. Section 120 and 4013, et seq:

Joseph E. Milardo, Esq.
Jozus, Milardo & Thomasson
73 Main Street
Middletown, CT 06457

Attorney for Plaintiff/Appellee

Richard D. Carella, Esq.
Carella & Moore
955 So. Main St.
Middletown, CT 06457

Committee

William J. Zisk
205 Thomas Street
Roseville, Calif. 95678

Defendant/Appellant
S/"PAUL GOZZI", ESQ.
Commissioner of the Superior Court

"ORDER"

"Motion for Articulation Denied"

S/"Spallone 6/15/93"

APPENDIX B

(Filed: Per Superior Court Clerk on 5-18-93)

NO. 62496

HIGH ST. ASSOCIATES	SUPERIOR COURT
V.	MIDDLESEX J.D.
WILLIAM J. ZISK	MAY 5, 1993

MEMORANDUM OF DECISION

By writ, summons and complaint dated June 4, 1991, the plaintiff is seeking a partition of certain real estate located at 106 High Street in the Higganum section of Haddam, Conn. as is more fully described in schedule A attached to said complaint. This action is brought pursuant to Gen, Stat. Sec. 52-495. The plaintiff is seeking partition by sale under Gen. Stat. Sec. 52-500.

The defendant has filed his answer, special defenses and a counterclaim in four counts. Count one of the defendants counterclaim seeks to quiet title, count two prays to annul a deal for fraud, count three claims unjust enrichment and count four asks relief for tortious interference with property rights. The plaintiff has filed his answer to the defendant's counterclaim.

After a full trial, all parties represented by counsel, the court, based on a preponderance of the credible, relevant and legally admissible evidence, finds, concludes, rules and orders as follows.

The plaintiff is a general partnership, organized and existing pursuant to the laws of the state of Connecticut. The plaintiff is known as High St. Associates and has an office and place of business at 1783 Saybrook Road, Haddam, Connecticut. The general partners are Architects Equity, Inc., and A.F.C. Inc. The defendant is William J. Zisk, 205 Thomas Street, Roseville, California.

The property subject to this partition action, was originally acquired by the parents of the defendant. They each held an undivided one half interest as tenants in common.

The defendant claims that as a wedding gift in 1952, his parents orally gave to him a four acre parcel contained within the property subject to this action. He also claims that his mother by will acknowledged this gift in writing.

The plaintiff acquired their interest in the property by virtue

of certain quit claim and warranty deeds recorded on June 3, 1991.

The court makes the following express finding of facts.

The plaintiff are owners as tenants in common of a 5/6 interest in the subject premises.

The plaintiff acquired title through deeds duly executed and duly recorded on the land records of the town of Haddam.

The defendant is the owner as tenant in common of a 1/6 interest in the subject property. He acquired his interest by virtue of a certificate of devise from his father's intestate estate of a 1/12 interest, and, a purchase from his sister of a 1/12 interest that she acquired from her father's estate.

The defendant's parents never executed or delivered a deed to the defendant conveying his claimed four acres.

The defendant's parents never executed or acknowledged in writing a conveyance of the four acres pursuant to the requirements and mandates of Gen. Stat. Sec. 47-5.

The defendant's parents, even if they orally made a gift of the real estate to the defendant, never completed the gift by delivering a conveyance to him.

Gen. Stat. Sec. 47-5 mandates that all conveyance of land be in writing, subscribed by the grantor, acknowledged and witnessed by two persons. No such conveyance is in this case. The defendant's claim of oral transfer is violative of this statute of fraud.

The defendant's claim of gift also fails because in order to effectuate a gift there must be a delivery. There is no evidence in this case that any writing, deed or declaration of trust was ever delivered to the defendant. The burden is on the defendant to prove both the donors intent to make a gift and a delivery. *Long v. Schull.*, 184 Conn. 252, 255 (1981). To constitute a valid gift, there must be a valid delivery accompanied by the intent of the donor that title shall pass immediately and irrevocably. *Bergen v. Bergen*, 177 Conn. 53, 56-57 (1979)

Assuming that the defendant's parents fully intended to make a gift to the defendant, such intent was never carried out because there was in fact no delivery. Before any delivery was made, the defendant's father died intestate and his interest in the land passed to his wife and children. When the defendant's mother declared in her will that she and her now deceased husband intended to give the four acres to the defendant, she no longer the owner of the land as co-tenant with her husband. Her husband's interests had passed by the laws of intestacy, 1/3 to her and 2/3 to the children. The land was not hers to give. In

any event such will was subsequently revoked.

The court finds the issues on the plaintiff's complaint for the plaintiff and a judgment of partition should enter.

The court finds that the defendant has failed to prove the allegations in his counterclaim and finds the issues on all four counts of same for the plaintiff. Judgment should enter for the plaintiffs on all counts of the defendant's counterclaim.

The court having determined that a partition is appropriate now turns to whether the partition should be in kind or by sale.

We fully aware that a partition in kind is favored over a partition by sale. *Rice v. Dowling*, 23 Conn. App. 460, 581 A.2d 1061 (1990). A partition by sale should be ordered only when the physical attributes of the land are such that a partition in kind is impractical and the interests of the owners would be better promoted by a sale and the divisions of the proceeds of the sale as per the respective interests. *Filipetti v. Filipetti*, 2 Conn. App. 456, 479 A2d 1229 (19840. The burden of proof is on the party requesting the sale to demonstrate that a sale should be ordered. *Delfino v. Vealencis*, 181 Conn. 533, 436 A.2d 27 (1980).

The highest and best use of the land subject to this action is a multiple lot residential subdivision. The subject property has limited frontage on the public highway and to partition in kind would severly impact on the highest and best use of the property. The potential for development would be virtually destroyed by a partition in kind. If any portion of the road frontage is set out separate from the balance of the property, access to the balance of the acreage would be severely limited and result in a detriment to all parties. Partition in kind to rear acareage would be inappropriate, speculative at best and contrary to the best interests of the parties.

Accordingly, a partition by sale should be ordered because in the opinion of the court based on a preponderance of the credible, relevant and legally admissible evidence, a sale would better promote the interests of the owners.

The court heard testimony as to the value of the premises.

Charles Burr, testifying as an expert for the plaintiff, appraised the property at $182,000.00.

Gerry Adam, testifying as an expert for the defendant, valued the property at $373,700.00.

In valuating property, the trial court is charged with the duty of making an independent valuation of the property involved. *E & F Realty v. Commission of Transportation*, 173 Conn. 247, 253, 377 A.2d 302 (1977). The trier is not limited to arbitrating

the differing opinions of the witnesses but is to make determinations in the light of all the circumstances, the evidence, and his general knowledge. *Pandolphe's Auto Parts, Inc. v. Manchester*, 181 Conn. 217, 220, 435 A.2d 24 (1980); *Birnbaum v. Ives*, 163 Conn. 12, 21, 301 A.2d 262 (1972). The trier may accept or reject the testimony of an expert, offered by one party or the other, in whole or in part. *Smith v. Smith*, 183 Conn. 121, 123, 438 A.2d 847 (1981); *Richard v. A. Waldman & Sons, Inc.*, 155 Conn. 343, 348, 232 A.2d 307 (1967); see also Pandolphe's Auto Parts, Inc. v. Manchester, supra, 221. Ultimately the determination of the value of real estate is a matter of opinion, which eventually depends upon the considered judgment of the trial judge who takes into account the different opinions expressed by the various witnesses. *Moss v. New Haven Redevelopment Agency*, 146 Conn. 421, 425, 151 A.2d 693 (1959).

Applying the aforesaid law to the facts and circumstances of this case, the court independently finds the value of the subject premises to be in the amount of $220,000.00.

In summation, the court having found the issues on the defendant's counterclaim for the plaintiff, judgment is entered for the plaintiff on all four counts of the defendant's counterclaim.

Further the court, having heard the parties, finds that the material allegations of the plaintiff's complaint are true; that the interests of the parties are as follows: the plaintiff, High St. Associates is the owner of a 5/6 undivided interest as a tenant in common with the defendant, William J. Zisk, who is the owner of an undivided 1/6 interest in the premises, and in the opinion of the court a sale will better promote the interests of the parties.

Wherefore, it is ordered that the property be sold and that Attorney Richard D. Carella of 955 South Main Street, Middletown, Conn. is appointed to sell the property subject to this action; that he shall sell the property as a whole, free and clear of all claims against the property, except a mortgage, securing a note in the amount of $183,333.32, from High St. Associates to Mary Zisk, Edward J. Zisk and Donald R. Zisk as recorded in Vol. 180, page 238 of the land records of the town of Haddam, Conn.*, at public auction at 106 High Street in the Higganum section of Haddam, Conn. on Saturday, June 19, 1993 at 12 noon to the highest bidder; that he shall advertise such sale by placing a notice of same in both the Middletown Press and the Hartford Courant on two successive Saturdays, to wit June 5, 1993 and June 12, 1993 and by a sign on the

premises to be placed not later than May 29, 1993; that when such sale has been made, the committee shall execute and submit for the approval of this court a conveyance of the property to the purchaser, and make a return of his doings and pay to the clerk of this court the money arising from such sale; and that the reasonable costs and expenses of the sale shall be paid out of the proceeds thereof.

S/"SPALLONE"
STATE TRIAL REFEREE

Judgment Entered in Accordance
with Foregoing Memorandum of Decision.

S/"Michael Kokoszka", Chief Clerk

(continued in manuscript)

* add-"and two lease agreement
with respect to the two family home located on the
premisis"
S/"Spallone 5/18/93"

APPENDIX C

STATE OF CONNECTICUT

(Filed in Appellate Court on June 8,1993)

No. 62496

High Street Associates, of Haddam, Connecticut	Superior Court
v.	Judicial District of Middlesex
William J. Zisk, of Roseville, California	May 18, 1993

Present: Hon. Daniel F. Spallone, State Trial Referee

REVISED JUDGMENT

This action, by writ and complaint, claiming a partition or sale of certain real property located at 106 High Street, town of Haddam, and more fully described as follows:

Schedule A

All of those certain pieces or parcels of land situated in the village of Higganum, in the Town of Haddam, County of Middlesex and State of Connecticut, bounded and described as follows:

First Piece - The Homestead, so called, bounded by a line beginning on the highway at the northwest corner of said homestead property and running thence easterly by land of Frank Skrivanek, to land of Charles B. Carlson; thence southerly by lands now or formerly of Charles B. Carlson, Robert H. Carlson and Burr & Baroni, Incorporated, to land now or formerly of Carl Andeen; thence westerly by land of Carl Andeen to the highway; thence northerly by highway to land of Herbert S. Johnson; thence easterly, northerly and northwesterly by land of said Herbert S. Johnson and land of Charles B. Carlson to land of Mazie M. Carlson; thence northerly and westerly by land of said Mazie M. Carlson to the highway; thence northerly by highway to the point of beginning, containing by estimation twenty-four (24) acres, more or less, with the dwelling house and all other buildings and improvements thereon, together with such rights of way and rights to maintain water pipes appurtenant to the land granted as

of record may appear, and especially as described in deed from Charles B. Carlson to Otto F. Carlson dated August 1, 1908 and recorded in Vol. 47, pages 420, 421, and 422 of the Haddam Land Records; the premises being also subject to certain rights of way and to maintain water pipes, as by record will appear and especially as described in deed of Otto F. Carlson to Gustaf B. Carlson dated September 9, 1913 and recorded in Vol. 51, at page 228 of the Haddam Land Records, and in an agreement between Otto F. Carlson and Charles B. Carlson dated August 18, 1916 and recorded in Haddam Land Records, Vol. 51, at Page 393.

Second Piece - being sprout land and containing seven (7) acres, more or less, bounded northerly and easterly by land now or formerly of Burr & Baroni, Incorporated; southerly by lands now or formerly of Mashinda and Carl Andeen and westerly by the Third Piece herein described, it being the second piece described in a deed from Charles B. Carlson to Otto F. Carlson dated August 1, 1908, recorded in Vol. 47, at Pages 420, 421 and 422 of the Haddam Land Records.

Third Piece - Being sprout land and containing one acre, more or less, bounded northerly by land formerly of Cyrus A. Hubbard, easterly by land formerly of Cyrus A. Hubbard, in part and partly by land formerly of James C. Walkley; southerly by land of Cyrus A. Hubbard and westerly by land formerly of Chauncey D. Skinner being the same land described as the third piece in said deed of Carlson to Carlson, recorded in Vol. 47, at Pages 420-422 of said Haddam Land Records.

Excepting therefrom the following pieces:

1. A certain piece of parcel of land being 20 feet by 220 feet, more or less, easterly of the old bottling works as more fully described in a Quit Claim Deed from William W. Zisk and Mary A. Zisk to Buckley E. Johnson and Eric H. Johnson dated February 3, 1948 and recorded April 14, 1948 in Volume 73, at Page 351 of the Haddam Land Records.

2. A certain piece or parcel of land being 20 feet by 111 feet, more or less, northerly of the old bottling works as more fully described in a Quit Claim Deed of William W. Zisk and Mary A. Zisk to Jennie E. Johnson dated February 3, 1948 and recorded April 14, 1948 in Volume 73, at Page 353 of the Haddam Land Records.

3. A certain piece or parcel of land resulting from a "Boundary Agreement and Mutual Quit Claim" between William W. Zisk and Mary A. Zisk and Willard B. Marsden and Roslyn B. Marsden dated May 26, 1959 and recorded May 26, 1959 in Volume 90, at Page 438 of the Haddam Land Records.

Said premises are conveyed together with:

1. A right of way to pass and repass with teams and on foot over the May Lot as more fully described in a Quit Claim Deed from Charles B. Carlson to Otto F. Carlson dated August 1, 1908 and recorded August 19, 1908 in Volume 47, at Page 420 of the Haddam Land Records.

2. A right to lay, maintain and repair water pipes on said May Lot as more fully described in a Quit Claim Deed from Charles B. Carlson to Otto F. Carlson dated August 1, 1908 and recorded August 19, 1908 in Volume 47, at Page 420 of the Haddam Land Records.

3. A certain piece or parcel of land resulting from a "Boundary Agreement and Mutual Quit Claim" between William Zisk and Mary Zisk and Willard B. Marsden and Roslyn B. Marsden dated May 26, 1959 and recorded May 26, 1959 in Volume 90, at Page 438 of the Haddam Land Records.

4. Water rights or easements reserved over a 20 foot by 111 foot, more or less, area as more fully described in a Quit Claim Deed from William W. Zisk and Mary A. Zisk to Jennie E. Johnson dated February 3, 1948 and recorded April 14, 1948 in Volume 73, at Page 352 of the Haddam Land Records.

5. A right to require fence maintenance along the southerly half of a division fence along the easterly line of a 20 foot by 220 foot, more or less, piece of the old bottling works as more fully described in a Quit Claim Deed from William W. Zisk and Mary A. Zisk to Buckley E. Johnson and Eric H. Johnson dated February 3, 1948 and recorded April 14, 1948 in Volume 73, at Page 351 of the Haddam Land Records.

and other relief came to this court on July 16, 1991 and thence to later dates when the defendant appeared and filed special defenses and an amended counterclaim, when the matter was referred to the state trial referee for hearing and judgment, and when the parties appeared and were at issue before the Court, as on file.

The matter came thence to May 6, 1993.

The Court, having heard the parties, found that the material allegations of the complaint are true; that the interest of the parties in the property were as follows:

The plaintiff are owners as tenants in common of a 5/6 interest in the subject premises.

The defendant is the owner as tenant in common of a 1/6 interest in the subject property and in the opinion of the Court a sale would better promote the interest of the parties. The court further found the issues in favor of the plaintiff on the defendant's counterclaim.

Whereupon it was ordered that the property be sold and that Richard D. Carella, Esq., of Middletown, Connecticut, is appointed a committee to sell the property above described; that he shall sell the property as a whole, free and clear of all claims against the property except for a mortgage securing a note in the amount of $183,333.32 from High Street Associates to Mary Zisk, Edward J. Zisk and Donald R. Zisk as recorded in Vol. 180, Page 238 of the land records of the town of Haddam, the holders of which are bound by this action, at public auction at 106 High Street, in the Higganum section of the town of Haddam on Saturday, June 19, 1993 at 12 noon to the highest bidder; that he shall advertise such sale in the Middletown Press and the Hartford Courant on two successive Saturdays to wit, June 5, 1993 and June 12, 1993, that when such sale has been made, the committee shall execute and submit for the approval of this Court a conveyance of the property to the purchaser, and make a return of his doings and pay to the clerk of this court the money arising from such sale; and that the reasonable costs and expenses of the sale shall be paid out of the proceeds thereof.

It was further ordered that judgment enters in favor of the plaintiff on the defendant's counterclaim.

The matter came thence to May 17, 1993, when the committee filed a motion for advice and thence to the present time.

Whereupon it is adjudged that the judgment of May 6, 1993 is opened and modified to include that the property be sold whole, free and clear of two lease agreements with respect to the two-family house located on the premises.

The judgment is affirmed in all other respects.

By the Court
S/"Michael Kokoszka", Chief Clerk

APPENDIX D

(APPELLATE OPINION)

High Street Associates v. William J. Zisk
(12482)

Foti, Heiman and Schaller, Js.
Argued May 6-decision released May 31, 1994

Action for the partition of certain real property owned by the plaintiff and the defendant as tenants

in common, brought to the Superior Court in the judicial district of Middlesex, where the defendant filed a counterclaim;thereafter, the matter was referred to *Hon. Daniel F. Spallone*, state trial referee; judgment ordering partition by sale and appointing a committee to conduct the sale, and in favor of the plaintiff on the counterclaim, from which the defendant appealed to this court. *Affirmed.*

Paul Gozzi, for the appellant (defendant).
Jennifer L. Berkenstock, with whom was *Joseph E. Milardo, Jr.*, for the appellee (plaintiff).

PER CURIAM. The judgment is affirmed.

1e

APPENDIX E

SUPREME COURT

STATE OF CONNECTICUT

NO. PSC-94-0127
High Street Associates
v.
William J. Zisk

ORDER ON PETITION FOR CERTIFICATION TO APPEAL

On consideration of the petition by the defendant for certification to appeal from the Appellate Court (34 Conn. App. 922 [AC 12482]), it is hereby ordered that said petition be, and the same is hereby denied.

BY THE COURT,
S/"ALAN M. GAN....."
ASSISTANT CLERK-APPELLATE

Dated: September 14, 1994
Notice sent: 9/14/94
Clerk, Superior Court, Middlesex 062496S
Clerk, Appellate Court
William J. Zisk, pro se
Carta, Sluis & Paladino
Jozus, Milardo & Thomasson
Carella & Moore

William J. Zisk, pro se, in support of petition; Joseph E. Milardo, Jr. in opposition.

1f

APPENDIX F

ORDER **(Superior Court of Middlesex County Conn.)**
The foregoing motions having been heard by the Court, it is hereby ORDERED:

1. The Committee Sale and Deed be approved;
2. The Committee Report be accepted;
3. The Committee be allowed a fee of $1,670.00 and the sum of $2,069.68 for his expenses, totaling $3,739.68.

BY THE COURT
S/"AURIGEMMA. J. / 10 24 94 "
Judge/Clerk

Supreme Court, U.S.
FILED
FEB 7 1995
OFFICE OF THE CLERK

(2)

No. 94-1199

In The

Supreme Court of the United States

October Term, 1994

WILLIAM J. ZISK,

Petitioner,

v.

HIGH STREET ASSOCIATES

Respondent

On Petition For Writ Of Certiorari To The Superior Court For The Judicial District of Middlesex, State of Connecticut

---

RESPONDENT'S BRIEF IN OPPOSITION

JOSEPH E. MILARDO, JR.
Counsel of Record
LINDA J. CANNATA
Jozus, Milardo & Thomasson
73 Main Street
Middletown, Connecticut 06457
(203) 347-4686

Attorneys for Respondent

February 6, 1995

BEST AVAILABLE COPY

29pp

QUESTION PRESENTED

Is the Petitioner entitled to access to this Court for review of the actions of the Courts of the State of Connecticut?

LIST OF PARTIES

The only proper parties in this action are petitioner, William J. Zisk, and respondent, High Street Associates, which is a partnership organized and existing under the laws of the State of Connecticut. Although Petitioner also names as parties Mary A. Zisk, Edward J. Zisk, Donald R. Zisk, Architects Equity Inc. and A.C.F. Inc., they are not proper parties because they were not parties to any proceeding in the Courts whose judgment is sought to be reviewed.

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C. A. Wright, The Law of Federal Courts (1984) 10, 13

No. 94-1199

In The

Supreme Court of the United States

October Term, 1994

WILLIAM J. ZISK,

Petitioner,

v.

HIGH STREET ASSOCIATES

Respondent

On Petition For Writ Of Certiorari To The Superior Court For The Judicial District of Middlesex, State of Connecticut

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, High Street Associates, respectfully asks this Court to deny the petition for certiorari filed by William J. Zisk seeking review of the judgment of the Superior Court for the Judicial District of Middlesex dated May 5, 1993 as revised by the Court on May 16, 1993.

COUNTER-STATEMENT OF THE CASE

The Petitioner's mother and father, William W. Zisk and Mary A. Zisk, purchased a parcel of land of approximately 32 acres and known as 106 High St. in the Town of Haddam, Connecticut, on December 3, 1943. At the time of the purchase the Petitioner was a child. Until sometime in the 1960's the Petitioner's mother and father resided in the family home on that property and raised their four children, including the Petitioner, therein.

The Petitioner left home to serve in the Armed Forces when he was a young man and returned home briefly after his military service before moving to California. The Petitioner never lived anywhere else on the subject property except in the Zisk family home and there was no conveyance of any portion of that property to the Petitioner (nor to any other family member for that matter) by William W. Zisk and/or Mary A. Zisk.

When Petitioner's father died in 1969 owning an undivided one-half interest in the subject property, Connecticut's law of intestate distribution dictated that Petitioner's father's one-half interest in the property would devolve to his heirs-at-law in the following proportions: 2/3 of that one-half interest to his surviving spouse, who is the Petitioner's mother, and 1/3 of his one-half interest to each of the children of William and Mary Zisk. Mathematically, this resulted in Mary A. Zisk, widow of William W. Zisk, owning an undivided three-quarters interest in the 32 acre parcel and the Petitioner and his three siblings owning a 1/12th share each in the parcel of land on which stood the family home. The Petitioner's mother continued to reside in the State of California until her death in 1994, renting the family home to tenants and collecting the rents.

The Petitioner's mother and other siblings of the Petitioner

marketed the family home and acreage on and off for over twenty years until a principal of the Respondent High St. Assoc., Mr. Steven Rocco, engaged in several negotiations with them and ultimately agreed to purchase the property. At that time Mr. Rocco also negotiated the purchase with the Petitioner but they never reach an agreement as to the sale of Petitioner's interest in the property. A conditional contract for sale was entered into between Rocco, the Petitioner's mother and three of his siblings which also conferred a limited power of attorney on Rocco to commence a "partition" lawsuit in the State of Connecticut to resolve the ownership issues in accordance with Connecticut law. That proceeding was terminated on the day it was assigned for trial when one of the siblings withdrew from Rocco the authority to act as attorney-in-fact for her.

Subsequent to the termination of that lawsuit a non-conditional sale of a five-sixth's interest in the same property was consummated between the Respondent, High St. Assoc., the Petitioner's mother and two of his siblings and a property deed was acquired for that interest by the said Respondent. At the same time Petitioner's sister and the Petitioner entered into a transaction whereby the Petitioner acquired his sister's one-twelfth share thereby increasing his interest to a one-sixth share of the premises.

Subsequent to the two transactions which resulted in the two owners of the property, the Petitioner and the Respondent, High St. Associates, owning a 1/6th and 5/6th interest in the subject property respectively, a new "partition" lawsuit was instituted by the Respondent in the Superior Court for the Judicial District of Middlesex at Middletown, Connecticut. At the conclusion of a trial on the merits at which the Respondent was present and represented by counsel, the Honorable Daniel Spallone, Trial Referee of the State of Connecticut, ordered a

partition sale of the property be held. An appeal was taken by the Petitioner to Judge Spallone's decision to the Connecticut Appellate Court, and after a due hearing on the arguments, which were also briefed, the Appellate Court affirmed the lower court's decision. The Petitioner then petitioned the Connecticut Supreme Court for a Writ of Certiorari to be granted in this case, which petition the Connecticut Supreme Court denied.

Following the aforesaid proceedings and while no stays, statutory or court ordered, were in effect, the partition sale was held and the proceeds of the sale placed with the Clerk of the Court for the Judicial District of Middlesex. This petition for Writ of Certiorari was filed subsequent to all of the foregoing proceedings taking place.

MISSTATEMENTS OF FACT AND/OR LAW

The Respondent, High Street Associates, hereby represents that the following statements of fact and/or law reported in Petitioner's brief are misstatements and are represented by Respondent to be factually incorrect as to the best knowledge and belief of the Respondent and/or legally incorrect as the case may be:

1. Petitioner's Brief, page 3

"As a 'wedding gift' to the newlyweds, William W. Zisk and Mary A. Zisk (father and mother) granted a four acre portion of the subject 106 High Street, Higganum, Connecticut property, adjacent to Route 81, to their son, William J. Zisk."

The Respondent represents that no documentary or testimonial evidence was presented, except for the oral, self-serving

assertion of William J. Zisk, that a four acre parcel of land was ever transferred to him. To the contrary, Respondent's principal testified that in his dealings with Mary A. Zisk, the mother of William J. Zisk, she always maintained that she and her deceased husband were the only owners of the family property. When Petitioner's father died in 1969, the Petitioner and his siblings received an intestate share of the one-half interest their deceased father owned pursuant to Connecticut Intestate Law.

2. Petitioner's Brief, page 3

"As a condition of the 'granted gift', William W. Zisk and Mary A. Zisk agreed to hold the gifted 4 acre parcel in a 'trust' within the overall thirty-two acre homestead . . . "

In all of Respondent's conversations with Mary A. Zisk, Petitioner's mother, she made it clear she knew of Petitioner's claims but her assertions were that no trust ever existed and the family property was free and clear of any claims by her children except for the intestate share each was provided by Connecticut's laws of intestate succession on the passing of her husband, William W. Zisk.

3. Petitioner's Brief, page 4

"In fact, the decedent held no interest in the four acre parcel, having conveyed the same to William J. Zisk, and, as to the remaining 28 acre parcel, the entire interest therein was subject to administration by the Probate Court in Haddam, Connecticut."

The Petitioner's father never divested himself of any interest in the approximately 32 acres he and his wife, Mary A. Zisk, purchased in 1943. They never conveyed a four acre parcel from that parcel to the Petitioner as he asserts. As to the

portion of the property which was subject to Estate Administration in the Probate District of Haddam, Connecticut, on the passing of Petitioner's father, William W. Zisk, only a one-half interest in the 32 acres was subject to distribution. This was due to the fact that when William W. Zisk and Mary A. Zisk obtained title to their property by deed in 1943, the title they received resulted in a tenancy-in-common between them so that each possessed an undivided one-half interest to the entire parcel requring that that interest be distributed by will or law of intestacy at death.

4. Petitioner's Brief, page 4

"As to the interest in the Estate of William W. Zisk held by Mary A. Zisk, the applicable Connecticut General Statutes, Title 46, Chapter 809, Section 46-12 clearly establishes a 'survivor' to the Husband and Wife Deed to hold a life use interest, which is not marketable."

This is a misstatement of fact and Connecticut's law. Connecticut General Statutes, Section 46-12 was transferred to Connecticut General Statutes, Section 45-273a in 1979 and the provisions thereof once again transferred to Connecticut General Statutes, Section 45a-436 in 1991 (see Appendix B). That statute pertains to intestate succession upon the death of a spouse and a spouse's right to seek a statutory elective share against the provisions of the will of a decedent spouse in which the surviving spouse has been excluded or otherwise wishes to make such election. It does not stand for the legal principle advanced by Petitioner in his brief. Moreover, the 1943 deeded title to William W. Zisk and Mary A. Zisk did not create a joint tenancy with survivorship rights.

4. Petitioner's Brief, page 4

"The disputed title to the Zisk Family Estate could not and was not capable of being resolved in a partition action, without the active indispensable [sic] inclusion and participation of the members of the Zisk family."

This is a misstatement of fact and law because the trial court was satisfied that the parties before it represented the necessary parties to the partition lawsuit and it proceeded to judgment having made that determination. The judgment of the Superior Court for the Judicial District of Middlesex at Middletown, Connecticut was subsequently affirmed on appeal wherein the same issue was briefed and argued.

5. Petitioner's brief, page 8

"Immediately thereafter, and during the period when an automatic stay of execution of the judgment was in effect, the respondent noticed a hearing, to be heard before the Honorable Daniel F. Spallone, in Superior Court at Middletown, on July 15, 1994, to set a date to execute on the judgment . . . "

The aforesaid Motion for Instructions referred to by Petitioner was dated June 8, 1994, a date after the Connecticut Appellate Court had affirmed the lower court's judgment on May 31, 1994 and before the Petitioner filed a Motion for Reargument or Reconsideration in the Appellate Court. The filing of the Motion for Instructions to the Committee for Sale was not filed when any stay of execution of the judgment was in effect. Before the trial Court ruled on Respondent's Motion for Instructions to Committee, the Appellate Court denied the Petitioner's Motion for Reargument or Reconsideration. Therefore, there was no action pending on which stay of execution could be had. When the trial Court issued its instructions to the Com-

mittee for Sale, no stay was in effect.

SUMMARY OF THE ARGUMENT

Under 28 U.S.C. § 1257, the Supreme Court may only review a State Court judgment if a federal question is raised. Because no federal question is presented in this matter, this Court should dismiss Petitioner's Petition for Writ of Certiorari for lack of jurisdiction.

Assuming, arguendo, that this Court were to consider Petitioner's Petition for Writ of Certiorari as raising a federal question, the jurisdiction of this court would still not be invoked for several reasons. To begin with, any raising of a federal question must be substantial. Here, the raising of any federal question is not substantial because it is wholly formal and devoid of merit. Furthermore, no federal question was raised in a proper and timely manner. Petitioner makes an attempt to raise a federal question for the first time by merely using the buzz words "due process" in his Petition for Writ of Certiorari. In addition, the jurisdiction of this Court is not invoked because the Connecticut State Court judgment rests exclusively on adequate state grounds.

Lastly, Petitioner's Petition for Writ of Certiorari should be dismissed because Petitioner requests this court to review the judgment or decree of the trial court rather than requesting this Court to review the judgment or decree rendered by the highest court in Connecticut.

REASONS FOR DENYING THE WRIT

I

PETITIONER'S PETITION FOR WRIT OF CERTIORARI SHOULD BE DISMISSED FOR LACK OF JURISDICTION IN THAT THERE IS NO FEDERAL QUESTION PRESENT IN THIS MATTER.

Petitioner William J. Zisk's petition for a Writ of Certiorari should be dismissed because the underlying case does not fall under those categories of cases subject to Supreme Court review. A Writ of Certiorari for Supreme Court review of a state Court judgment may be sought only under limited circumstances as set forth in 28 U.S.C. § 1257, as follows:

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

In addition, rule 10 of the Supreme Court Rules set forth the following considerations governing review on a Writ of Certiorari:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judi-

cial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

The case at bar, which was a complaint for partition by sale, clearly does not fall under any categories as required by 28 U.S.C. § 1257, and as set forth in Rule 10 of the Supreme Court Rules. More specificially, the categories set forth in that statute require a federal question in order to invoke this jurisdiction of the Supreme Court. C. A. Wright, The Law of Federal Courts 743 (1984). The Supreme Court is the ultimate decision maker on whether there is a federal question. Angel v. Bullington, 330 U.S. 183, 189 (1947). ("Whether . . . claims are based on a federal right or are merely of local concern is itself a federal question on which this Court . . . has the last say.") The underlying action for partition involves only matters of State law regarding Partition by Sale. In other words, the case does not raise or implicate any federal question.

It is well-settled that a State Court interpretation of state law is the final authority. The U.S. Supreme Court in Mullaney v. Wilbur, 421 U.S. 684 (1975), acknowledged this long standing principle as follows:

> This Court . . . repeatedly has held that State Courts are the ultimate expositors of State law, see, e.g. Murdock v. City

> of Memphis, 20 Wall 590, 22 L.Ed. 429 (1875); Winters v. New York, 333 U.S. 507, 92 L.Ed. 840, 68 S.Ct. 665 (1948), and that we are bound by their constructions except in extreme circumstances . . .

Mullaney, 421 U.S. at 691.

The Mullaney Court defined the extreme circumstances to warrant examination of State Court interpretations of State law, as follows:

> On rare occasions the Court has re-examined a State Court interpretation of State law when it appears to be an 'obvious subterfuge to evade consideration of a federal issue.' Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 129, 89 L.Ed. 2092, 65 S.Ct. 1475 (1945) . . .

Mullaney, 421 U.S. at 691, f 11.

Extreme circumstances warranting Supreme Court review, whch have been defined as an obvious subterfuge to evade consideration of a federal issue, are not present in the case at bar, and accordingly, this Court should honor the Connecticut State Court's decision ordering the Partition of the Zisk property by Sale.

The Supreme Court in Herb v. Pitcairn, 324 U.S. 117 (1945), gave the following explanation on the long standing limitation on review of State Court decisions:

> This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds . . . The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and Federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that

> they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the said judgment would be rendered by the state court after we corrected its view of Federal laws, our review could amount to nothing more than an advisory opinion.

Herb, 324 U.S. at 125-26.

Accordingly, Respondent respectfully requests that Petitioner's Petition for Certiorari be dismissed on the ground that no federal question is raised.

II

EVEN IF THIS COURT FINDS A FEDERAL QUESTION, PETITIONER'S PETITION FOR WRIT OF CERTIORARI SHOULD STILL BE DISMISSED BECAUSE ANY FEDERAL QUESTION IS NOT SUBSTANTIAL, NOT RAISED IN A TIMELY MANNER, AND MOREOVER, THE CONNECTICUT STATE COURT DECIDED THE CASE EXCLUSIVELY ON ADEQUATE GROUNDS OF STATE LAW.

This Court should find Petitioner unsuccessful in his attempt to persumably raise a federal question by using the buzz words "due process" in his reasons for granting his Writ of Certiorari. (Brief of Petitioner, pages 11 and 14). Petitioner baldly claims, in part, that he was denied due process by the granting of the second partition complaint and that he was denied due process by the Court's denial of the Motion to Implead certain parties. Petitioner fails to set forth any reasoning as to why a due process analysis is even applicable here. The mere assertion of a "due process" violation does not convert a case which has absolutely no federal question into a case that thereafter has a federal question.

Nonetheless, assuming, arguendo, this Court were to even consider the case at bar as raising a federal question, the jurisdiction of this Court would still not be invoked for three reasons.

First, a federal question will not permit review unless it is substantial. Snowden v. Red River and Bayou, 284 U.S. 592 (1932) ("the Court, being of opinion that no substantial federal question is presented, dismisses the Writ of Certiorari.") A question as to federal law is not substantial if it "is wholly formal, or is so absolutely devoid of merit as to be frivolous, or has been explicitly foreclosed by a decision or decisions of the Supreme Court so as to leave no room for real controversy." C.A. Wright, The Law of Federal Courts 743-44 (1984). Here, any raising of a federal question by Petitioner is not substantial because it is wholly formal and so devoid of merit as to be frivolous. Accordingly, the jurisdiction of this Court is not invoked.

Second, assuming, arguendo, that this Court were to find a substantial federal question, it must be raised "in a proper and timely manner in the State courts." C.A. Wright, The Law of Federal Courts 744 (1984). Here, no federal question was raised or implicated at any time during the State court proceedings. The raising of a federal question for the first time in a Writ of Certiorari to this Court is clearly untimely.

Third, assuming, arguendo, this Court were to find a substantial federal question raised in a timely manner, this court's jurisdiction would still not be invoked. It is well-settled that this Court cannot review a state Court decision if the state Court has decided the matter, which has a federal question, on an adequate state ground. This principle was explained by the Court in McCoy v. Shaw, 277 U.S. 302 (1928), as follows:

It is settled law that a judgment of a State Court which is

> put upon a non-federal ground, independent of the federal question involved and broad enough to sustain the judgment, cannot be reviewed by this Court, unless the non-federal ground is so plainly unfounded that it may be regarded as essentially arbitrary or a mere device to prevent the review of the decision upon the federal question. Citations omitted.

McCoy, 277 U.S. at 303. See also Johnson v. New Jersey, 384 U.S. 719, 735 (1966).

Assuming, arguendo, that a federal question was raised in this matter, there can be no doubt that the granting of the partition by the Connecticut State Court rests on adequate state grounds, and therefore, this Court cannot review the state Court's decision.

III

THE PETITION FOR WRIT OF CERTIORARI IS DEFECTIVE BECAUSE PETITIONER DOES NOT APPEAL FROM THE JUDGMENT OR DECREE FROM THE HIGHEST COURT IN CONNECTITCUT.

In Petitioner's reasons for granting Writ of Certiorari, Petitioner requests this Court to review the judgment or decree of the trial Court (Brief of Petitioner, pgs. 11, 12, 14). Petitioner's Petition for Writ of Certiorari is defective because Petitioner does not request this Court to review a final judgment or decree rendered by the highest Court in Connecticut, which is the Connecticut Supreme Court. 28 U.S.C. § 1257 on State Courts; Certiorari provides in relevant part:

> Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court (emphasis added) . . .

Petitioner initially appealed the trial Court's decision to the Connecticut Appellate Court, and then after the lower Court's judgment was affirmed by the Appellate Court, he requested the Connectitcut Supreme Court to grant certiorari. Said Petition for Certiorari was denied. Because Petitioner requests this Court to review the judgment of the trial Court rather than the judgment or decree of the highest Court in Connecticut, Petitioner's Petition for Writ of Certiorari should be denied.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Repectfully submitted,

Joseph E. Milardo, Jr.
Counsel of Record
Linda J. Cannata
On the brief

Jozus, Milardo, & Thomasson
73 Main Street
Middletown, Connecticut 06457
Attorneys for the Respondent

February 6, 1995

APPENDIX A

CERTIFICATE OF DISTRIBUTION OF REAL ESTATE

STATE OF CONNECTICUT)
: ss Haddam Probate Court
COUNTY OF MIDDLESEX) March 11, 1971

I, Janet M. Kellner, Clerk of the Court of Probate of Haddam in said State, and keeper of the seal thereof, do certify that it appears from the records and files of this Court that William W. Zisk died a resident of County of Placer, California, owning property in said District on the 3rd day of February, 1969, intestate; that on the 17th day of January, 1970, Ancillary Administration on the estate of said deceased was granted to Mary A. Zisk, which appointment is still in full force and effect, and that on the 14th day of March, A.D., 1970 by a decree as of record will more fully appear said Court limited and allowed three months thereafter for the presentation of all claims against said deceased to the administrator of said estate and directed that public notice of said limitation be given as by statute required; that after the expiration of said three months said ancillary administratrix filed in Court an administration account and other returns, which have been accepted by the Court, from which it appears that public notice of said limitation was given as directed in said order and that all claims against said deceased presented to said ancillary administratrix within said time limited have either been paid, settled, or barred by law, and that all succession or inheritance taxes due the State of Connecticut have been fully paid and satisfied.

I further certify that the heirs-at-law and distributees of said estate have been ascertained by this Court to be

Mary A. Zisk	Wife	one-third
William J. Zisk	Son)	
Edward J. Zisk	Son)	
Marion A. Krivanec	Daughter)	two-thirds
Donald R. Zisk	Son)	

who took by inheritance all such right, title and interest as said deceased had at the time of his decease in and to four certain parcels of real estate situated in the Town of Haddam, County of Middlesex, State of Connecticut and more particularly bounded and described as follows, to wit.

FIRST PARCEL

An undivided one-third (1/3) interest in and to a certain piece or parcel of land, together with all the buildings and improvements thereon, located on the southerly side of Little City Road and the westerly side of Burr Road in the Town of Haddam, County of Middlesex, State of Connecticut, and containing sixty-eight (68) acres, more or less, and more particularly bounded and described as follows:

NORTHERLY	by Little City Road and land now formerly of Edward Jensen, partly by each;
EASTERLY	by Burr Road, land now or formerly of the Estate of Stella Stackpole, and land now or formerly of Charles E. Jackson, partly by each;
SOUTHERLY	by land now or formerly of the Estate of Stella Stackpole and land now or formerly of Charles E. Jackson, partly by each; and
WESTERLY	by land now or formerly of

Edward Jansen and land now or formerly of the Estate of Stella Stackpole, partly by each.

Being the same premises conveyed to said decedent, William Zisk, Mary A. Zisk and Edward J. Zisk by Warranty Deed of Helen Simkus, dated March 26, 1960 and recorded in the Haddam Land Records, Volume 91, page 318.

SECOND PARCEL

An undivided one-half (1/2) interest in a certain piece or parcel of land situated in the Village of Higganum in the Town of Haddam, County of Middlesex and State of Connecticut, bounded and described as follows:

The Homestead, so called, bounded by a line beginning on the highway at the northwest corner of said homestead property and running thence easterly by land of Frank Skrivanek, to land of Charles B. Carlson; thence southerly by lands now or formerly of Charles B. Carlson, Robert H. Carlson and Burr & Barone, Incorporated, to land now or formerly of Carl Andeen; thence westerly by land of Carl Andeen to the highway; thence northerly by highway to land of Herbert S. Johnson; thence easterly, northerly and northwesterly by land of said Herbert S. Johnson and land of Charles B. Carlson to land of Mazie M. Carlson; thence northerly and westerly by land of said Mazie M. Carlson to the highway; thence northerly by highway to the point of beginning, containing by estimation twenty-four (24) acres, more or less, with the dwelling house and all other buildings and improvements thereon, together with such rights of way and rights to maintin water pipes appurtenant to the land granted as of record may appear, and especially as described in deed from Charles B. Carlson to Otto F. Carlson dated August 1, 1908 and recorded in Vol. 47, pages 420, 421, and 422 of Haddam Land Records; the premises being also subject to

certain rights of way and to maintain water pipes, as by record will appear and especially as described in deed from Otto P. Carlson to Gustaf B. Carlson dated September 9, 1913 and recorded in Vol. 51, page 228 of Haddam Land Records, and in agreement between Otto F. Carlson and Charles B. Carlson dated August 18, 1916 and recorded in Haddam Land Records, Vol. 81, page 393.

THIRD PARCEL one-half (1/2) interest.

Being sprout land and containing seven (7) acres, more or less, bounded northerly and easterly by land now or formerly of Burr & Barone, Incorporated; southerly by land now or formerly of Mashinda and Carl Andeen and westerly by the Fourth Parcel herein described, it being the second piece described in deed from Charles B. Carlson to Otto F. Carlson dated August 1, 1908, recorded in Vol. 47, pages 420, 421, 422 of Haddam Land Records.

FOURTH PARCEL one-half (1/2) interest.

Being sprout land and containing one acre, more or less, bounded northerly by land formerly of Cyrus A. Hubbard, easterly by land formerly of Cyrus A. Hubbard, in part and partly by land formerly of James C. Walkley; southerly by land formerly of Cyrus A. Hubbard and westerly by land formerly of Chauncey D. Skinner being the same land described as the third piece in said deed of Carlson to Carlson, recorded in Vol. 47, pages 420-422 of said Haddam Land Records.

Said Second Parcel, Third Parcel and Fourth Parcel are the same premises described as the First Piece, Second Piece and Third Piece, respectively, in a deed to the decedent William W. Zisk and Mary A. Zisk from Beda L. Brainard, dated December 3, 1943 and recorded in the Haddam Land Records, Vol. 67, page 469.

IN TESTIMONY whereof, I have hereunto set my hand and affixed the seal of said Court on this 11th day of March, 1971.

[signed]
Attest Janet M. Kellner
Clerk

RECEIVED FOR RECORD
3/22 1971 at 9:00 A.M.
TOWN CLERK'S OFFICE
HADDAM, CONN.

[signed]
Beverly C. Rummel
Town Clerk

APPENDIX B

§ 45a-436. Succession upon death of spouse. Statutory share

(a) On the death of a spouse, the surviving spouse may elect, as provided in subsection (c) of this section, to take a statutory share of the real and personal property passing under the will of the deceased spouse. The "statutory share" means a life estate of one-third in value of all the property passing under the will, real and personal, legally or equitably owned by the deceased spouse at the time of his or her death, after the payment of all debts and charges against the estate. The right to such third shall not be defeated by any disposition of the property by will to other parties.

(b) If the deceased spouse has by will devised or bequeathed a portion of his or her property to his or her surviving spouse, such provision shall be taken to be in lieu of the statutory share unless the contrary is expressly stated in the will or clearly appears therein; but, in any such case, the surviving spouse may elect to take the statutory share in lieu of the provision of the will.

(c) The surviving spouse, or the conservator or guardian of the estate of the surviving spouse, with the approval, after public notice and hearing, of the court of probate by which such conservator or guardian was appointed, shall, not later than one hundred fifty days from the date of the appointment of the first fiduciary, as defined in section 45a-353, file a notice, in writing, of his or her intention to take the statutory share with the court of probate before which the estate is in settlement, and if such notice is not so filed, the surviving spouse shall be barred of such statutory share.

(d) If the court of probate has allowed a support allowance under section 45a-320 from the deceased spouse's estate for support of the surviving spouse and for the support of his or her family, the surviving spouse shall not take his or her statutory share until the expiration of the time for which the support allowance is made.

(e) The statutory share shall be set out by the fiduciary charged with the administration of the estate or, in the discretion of the probate court on its own motion or on application by any interested person, by distributors appointed by the court of probate. The statutory share may consist of personal property or real property, or both, according to the judgment of the fiduciary or distributors.

(f) The provisions of this section with regard to the statutory share of the surviving spouse in the property of the deceased spouse shall not apply to any case in which, by written contract made before or after marriage, either party has received from the other what was intended as a provision in lieu of the statutory share.

(g) A surviving husband or wife shall not be entitled to a statutory share, as provided in subsection (a) of this section, or an intestate share, as provided in section 45a-437, in the property of the other if such surviving spouse, without sufficient cause, abandoned the other and continued such abandonment to the time of the other's death.

(h) The provisions of this section shall apply to estates of all persons dying on or after July 1, 1985.

(1949 Rev., § 7309; 1949, Supp § 598a; 1951, Supp. § 1283b; 1955, Supp. § 3002d; 1958 Rev., §§ 46-12, 45-273a; 1961, P.A. 64; 1963, P.A. 325; 1969, P.A. 233, § 1, eff. May 22, 1969; 1973, P.A. 73-36,

§ 1; 1976, P.A. 76-435, § 61, eff. June 9, 1976; 1978, P.A. 78-199, § 2; 1980, P.A. 80-476, § 322, eff. Oct. 1, 1980; 1985, P.A. 85-332, § 1, eff. July 1, 1985; 1987, P.A. 87-384, § 33; 1989, P.A. 89-56 § 1; 1990, P.A. 90-45, § 5; 1990, P.A. 90-146, § 9.)

Historical and Statutory Notes

Transfer of Section

This section was set out as § 46-12 and was transferred to as § 45-273a in Gen.St., Rev. to 1979.

This section, formerly set out as § 45-273a, was transferred to § 45a-436 in Gen.St., Rev. to 1991.